IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6157 OF 2002

Mrs.Asha Ajay Shekokar Petitioner

versus

The Secretary,
Kalyan Education Society & others Respondents

Mr.S.R.Borulkar, adv. for petitioner.
Mr.R.S.Apte, adv. for respondents 1 and 2.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 19th January 2005

ORAL JUDGEMENT :

1. This Court after hearing learned counsel for the petitioner on 28th October 2002 directed issuance of notice to respondents. The order passed to that effect by this Court specifically directs that the notice should indicate that the petition will be heard finally. Notice was made returnable after six weeks. Thereafter, procedural aspects pertaining to issuance of notice were complied with. Although, respondents 1 and 2 appeared through counsel, it appears that respondent no.3 remained unserved. Fresh notice was issued to respondent no.3 by this Court on 6th August 2003. Thereafter, respondent no.3 has been served. Although served, none appears for

respondent no.3. In pursuance of directions of this Court and with consent of petitioner and respondents 1 and 2, I am disposing of this petition finally. Hence Rule. Returnable forthwith.

2. By this petition under Articles 226 and 227 of the Constitution of India, the petitioner challenges an order passed by School Tribunal, Navi Mumbai dated 3rd July 2000 in Appeal No.71 of 2000. She further prays for a direction to respondents 1 and 3 to reinstate her in services as an Assistant Teacher with back wages and other benefits w.e.f. 21st November 1998.

3. First respondent is Secretary, Kalyan Education Society registered under provisions of Bombay Public Trusts Act, 1950 and Societies Registration Act. Respondent no.1 has established a school namely New Lourds High School, at Kalyan, District Thane. Respondent no.2 before me is the Head Master of the school. Respondent no.3 is Education Officer, Zilla Parishad, Thane.

4. Petitioner made an application for the post of Assistant Teacher in respondent no.2 school on

28th November 1997. Pursuant to this application, respondent no.2 issued appointment order dated 29th November 1997. By this appointment letter respondent no.2 appointed petitioner as Assistant Teacher on probation for two years subject to approval from the appropriate authority. Petitioner submits that the Education Officer by order dated 28th September 1998 approved her appointment. Petitioner was thus appointed as Assistant Teacher in reserved category.

5. It is petitioner's case that somewhere in the month of November 1998 she was seriously ill. Her husband is an employee of Indian Railways. As the petitioner was bleeding from mouth, her husband admitted her in Dr.Ambedkar Railway Hospital, Byculla, Mumbai. On 21st November 1998 petitioner submitted an application for leave initially from 21st November 1998 to 2nd December 1998.

6. Thereafter she applied for extension of leave. A written application was made in that behalf to the respondent no.2. By this application she pointed out that the doctors at Central Railway Hospital, Byculla have

diagnosised her as suffering from Pulmonary Tuberculosis. She pointed out that doctor had advised her to take six months rest. Her sputum was AfB(+). She applied for extension of leave up to 145 days from 21st November 1998. This application was received by the Head Master. This application was supported by medical certificate of the Central Railway Hospital.

7. On this application, respondent no.2 directed petitioner to submit a detailed and up to date medical report from Civil Surgeon, Thane. This direction was issued vide letter dated 26th February 1999. Petitioner was directed to submit the medical certificate by 6th March 1999.

8. On 6th March 1999 petitioner submitted an application along with certificate issued by Civil Surgeon, Civil Hospital, Thane and thus complied with the directions issued by respondent no.2.

9. On 19th April 1999 petitioner went to School personally and requested respondent no.2 to allow her to resume the duties. She submitted a fitness certificate from Civil Surgeon, Civil Hospital, Thane. Since this application did not

meet favourable response, petitioner once again applied on 10th May 1999 to respondent no.2. She reiterated her request to allow her to resume duties.

10. Respondent no.2 directed once again the petitioner vide letter dated 17th May 1999 to approach the Medical Board (T.B.), Sir J.J. Hospital, Byculla, Mumbai. Respondent no.2 also sent a letter to Superintendent, Medical Board, J.J.Hospital, Byculla to examine the petitioner. This letter is dated 1st June 1999.

11. It is petitioner's case that pursuant to the directions, she appeared before the Medical Board on 7th June 1999. She was informed that the medical board would require 15 days to submit the requisite report about her health to the school. Therefore, she once again approached the respondent no.2 requesting him that she may be permitted to resume duties and she would produce necessary certificate from the Board. Petitioner recorded this in her application of that date.

12. On 9th July 1999 the Superintendent, Medical Board, J.J.Hospital, Byculla submitted a letter along with certificate to the school stating that

petitioner was suffering from T.B..

13. On 31st January 2000 petitioner made an application to respondent no.2 stating that she is fit to join and therefore she be allowed to resume the duties.

14. It is her grievance that inspite of submitting necessary certificates respondents 1 and 2 did not allow her to resume duties with ulterior motives and malafide intentions. She visited the school on several occasions requesting the Head Master (respondent no.2) to allow her to resume the duties but she was not allowed to join the same. Her services were orally terminated. She was informed by the management that she need not come to school.

15. Petitioner approached the Education Officer (respondent no.3) vide her representation dated 9th February 2000 pointing out that the management illegally prevented her from resuming the duties. She sought respondent no.3’s intervention in the matter.

16. Since she did not hear anything from respondent no.3, she instituted an appeal against

oral termination before the School Tribunal, Navi Mumbai.

17. The said appeal was registered by School Tribunal as Appeal No.71/2000. It appears that stay application was made but the same was not pressed by the petitioner. Petitioner filed all relevant documents in support of her claim.

18. Respondents 1 and 2 filed their common written statement dated 10th October 2001. They contended that the appeal is not maintainable inasmuch as present case is of abandonment of service by the petitioner. This being the position, School Tribunal has no jurisdiction to entertain and try the appeal. It was their case that after 60 days from the date of certificate of Civil Surgeon, Thane and report of J.J.Hospital, petitioner did not submit any application for leave. She never turned up at the school. She was just issuing letters from April 2000 to create evidence of attendance at the school and non permission to sign the muster but in fact she never turned up. Thus, she abandoned the services. Reliance was placed on the Rules and more particularly Rule 16 of The Maharashtra Employees of Private Schools

(Conditions of Service) Regulation Act, 1977 (hereinafter referred to as "MEPS Rules" for short). For all these reasons it was submitted that the appeal be dismissed.

19. In the light of the rival contentions, the learned Presiding Officer framed necessary issue. Issue no.1 framed by him reads as under:-

> "i) Whether impugned oral order of termination dated 12.6.2000 is liable tobe quashed and set aside?"

20. Learned Presiding Officer after considering the rival contentions and documents on record dismissed the petitioner’s appeal. This order of dismissal, as stated above, is subject matter of challenge in this petition.

21. Mr.Borulkar, learned counsel appearing for petitioner submits that the order passed by School Tribunal is vitiated by errors apparent on the face of record and is wholly perverse. He submits that there is no question of a conclusion being recorded in the facts and circumstances of the present case that petitioner has abandoned the services. He submits that it was not open for respondents 1 and 2 to urge that petitioner

has abandoned the services when they did not comply with the mandatory requirements of Rules 33 to 37 of MEPS Rules. In other words, when the services of petitioner have been terminated orally and without holding any inquiry or written intimation, then there is no question of petitioner abandoning the services. That apart, the petitioner was personally present on 19th April 1999 and requested respondent no.2 to allow her to resume duties. This application was received by respondents 1 and 2 but they prevented the petitioner from resuming the duties. In the light of this clear factual position, the Presiding Officer could not have concluded that the petitioner abandoned her services. He submits that petitioner having been appointed on the post meant for reserved category and belonging to Scheduled Caste, has been terminated from services by management with malafide intention and ulterior motives. The case is of illegal termination and, therefore, the appeal should have been allowed. Therefore, according to Mr.Borulkar, this is a fit case where this Court should exercise it’s writ jurisdiction and quash & set aside the impugned order.

22. On the other hand, Mr.Apte, learned counsel appearing for respondents 1 and 2 supported the conclusions of School Tribunal. Additionally, he contends that findings of fact have been recorded based on materials produced and they cannot be interfered by this Court in exercise of its writ jurisdiction. Mr.Apte submits that admittedly the petitioner did not turn up after producing the certificate from the Medical Board of J.J.Hospital. Once the petitioner does not turn up at all, then a conclusion is inevitable that she is not interested and has abandoned the service on her own. Therefore, there was no substance in the grievance of petitioner that her services have been terminated orally on 12th June 2000. Therefore, the petition be dismissed.

23. With the assistance of learned counsel appearing for both sides I have perused relevant documents and order of School Tribunal.

24. There is much substance in the contentions of Mr.Borulkar that the termination is ex-facie illegal inasmuch as no notice was served or any enquiry held against the petitioner. Admittedly, there is no show cause notice or disciplinary enquiry. It is not in dispute that petitioner

was appointed in respondent no.2 school and her services have been approved by respondent no.3. It is also not in dispute that on 21st November 1998 she submitted an application for leave to respondent no.2 for the period 21st November 1998 to 2nd December 1998 on account of her hospitalisation. In this application she stated that she will produce the medical certificate soon. It is also not in dispute that another application was submitted for extension of leave for 145 days on 21st November 1998. It is also not in further dispute that respondent no.2 directed the petitioner to submit a detailed and up to date medical report from the Civil Surgeon, Thane. The Civil Surgeon after examining the petitioner, issued a medical certificate for extension of leave for a further period of 60 days from 1st March 1999. Petitioner produced fitness certificate but she was directed to approach the medical board and the medical board submitted report along with covering letter and it was stated therein that the absence of petitioner from 7th June 1999 to 6th August 1999 was necessary for her recovery.

25. The learned Presiding Officer has observed that respondents 1 and 2 have rightly contended

that petitioner did not turn up and has abandoned the services. This finding is recorded on the basis that the petitioner has not submitted leave application on medical ground from 7th August 1999 to 18th December 1999. The Presiding Officer in para 11 of the impugned order has observed that from the documents filed on record it appears that the petitioner has not submitted any application for leave from 19th April 1999 till 10th December 1999. In his view, the medical certificate should have been accompanied a leave application by the petitioner. He faults the petitioner for not making any application for medical leave save and except the initial two applications. Thereafter, he places reliance on Rule 16. Rule 16 of MEPS Act and more particularly relevant portion of Rule 16 reads thus :-

> "16. Leave :-
>
> (1) ... ...
>
> (2) An application for leave other than casual leave or extension of leave or to proceed on leave after vacation shall ordinarily be made in good time before the date from which the leave or its extension is sought. Even in exceptional cases where it is not possible to apply beforehand because of circumstances beyond the control of the employee, the application shall be made within 7 days from the date of absence. A

> non-permanent employee shall be deemed to have abandoned his service if he fails to apply for leave within seven days from the date of absence.
>
> (3) In the case of a permanent employee who, without sufficient cause, fails to apply for leave within 7 days from the date of absence, it shall be treated as breach of discipline and he shall be liable for suitable disciplinary action after due inquiry. A permanent employee who is absent from duty without leave continuously for a period exceeding three years or more, shall be deemed to have voluntarily abandoned his services."

26. As Rule 16(27) refers to provisions for special leave and allowances admissible to Government Servants, Appendix-III(A) of Rule 79 of Maharashtra Civil Services (Leave) Rules, 1981 has been pressed into service.

27. After referring to the aforesaid rules the Presiding Officer observes that after receipt of medical fitness certificate from J.J. Hospital on 18th December 1999 there is no documentary evidence to show that petitioner went to respondent no.2 for resumption of duties. Respondents have contended that petitioner never turned up. The Presiding Officer has observed that to contradict contentions of the management no substantial evidence has been produced by the petitioner. Having observed thus, the Presiding Officer refers to the report dated 31st January

2000 submitted by the petitioner along with medical fitness certificate obtained from the medical board. She requested the Head Master to allow her to join the duties. He observes that the said letter was received on behalf of respondent no.2. The Presiding Officer also refers to further letters in March and April 2000 forwarded by petitioner to respondent no.2 Under Certificate of Posting because the earlier letter was refused by respondent no.2.

28. The Presiding Officer has referred to the contents of letters to this effect that the petitioner has been visiting the school since 14th December 1999 but she has not been allowed to sign the muster roll though she has completed all formalities. The learned Presiding Officer does not observe that there are no letters on record. He does not observe that there is no substance in the contention of petitioner that she was not allowed to resume services inspite of these letters. The contents of even last letter i.e. 24th April 2000 have been referred. Thereafter, the Presiding Officer refers to a further fact namely that on reopening of the school on 12th June 2000 petitioner requested the Head Master to allow her to join the duties but

respondent no.2 refused and therefore the appeal is filed against this order of oral termination dated 12th June 2000.

29. The Presiding Officer dismisses the appeal ultimately not because there is no documentary evidence to show that petitioner requested respondent no.2 school for resumption of duties but because the petitioner was negligent in not submitting the leave application and for extension of leave in accordance with Rule 16 of MEPS Rules. The Presiding Officer faults the petitioner for not requesting the management to grant her extra-ordinary leave under the special circumstances. Thus, petitioner is denied the relief because of her failure to make any application for extension of leave. In other words, Rule 16(2) had been relied upon to record a finding that the petitioner has abandoned the services. The finding with regard to abandonment has been recorded on the basis that non submission of leave application or application for extension of leave leads to the conclusion that a case of abandonment of services has been made out.

30. The Presiding Officer’s conclusion, in my

view, is vitiated by apparent errors on the face of record. Rule 16(2) appears after Sub Rule (1) which states that leave shall not be claimed as a matter of right. Discretion to grant, refuse or cancel leave other than casual leave is reserved with the authorities mentioned therein. Then comes Sub Rule (2) which provides for application for leave other than casual leave or extension of leave or to proceed on leave after vacation. It only says that application for leave shall ordinarily be made in good time before the date from which the leave or it's extension is sought. Rule 2 takes care of exceptional cases and states that where it is not possible to apply beforehand because of the circumstances beyond the control of the employee, application shall be made within seven days from the date of absence. A non permanent employee shall be deemed to have abandoned his services, if he fails to apply for leave within seven days from the date of absence.

31. It is pertinent to note that the Presiding Officer has not held that no application for leave was made by the petitioner. On the other hand, he proceeds on the basis that the petitioner has abandoned her services with respondents 1 and 2 because she did not make any

application for leave after 6th March 1999. At the same time, he records a finding that after 18th December 1999 there is no documentary evidence to show that the petitioner attended respondent no.2 school and requested for resumption of duties. The Presiding Officer has not at all adverted to sub rule (3) of Rule 16 of MEPS Rules which applies to permanent employees. In case of permanent employee if without sufficient cause an application for leave is not made within seven days from the date of absence, it shall be treated as breach of discipline and the employee concerned shall be liable for suitable disciplinary action after due enquiry. In case of a permanent employee who is absent from duty continuously for a period exceeding three years or more, shall be deemed to have voluntarily abandoned his services.

32. In my view, the Presiding Officer ought to have first decided applicability of either sub rule 2 or sub rule 3 of Rule 16 of MEPS Rules to the case of petitioner. If the petitioner was on probation for a period of two years in an approved post, whether she could be considered to be a non permanent employee, and therefore, falling within sub rule 2 is not clear from the

Presiding Officer's order. In any case, for the deeming provision to apply it was necessary for the Presiding Officer to record that the petitioner has failed to apply for leave. The Presiding Officer does not observe that no application for leave was made at all. On the other hand, the finding is that medical certificate or report is not accompanied by leave application. The application for leave was initially filed and what was sought thereafter was extension of leave, on medical ground, as petitioner was unable to join because of ill health. It is doubtful whether in these circumstances the deeming provision can apply. Similarly, if petitioner is taken as a permanent employee, then definitely in her case a finding of voluntary abandonment could not have been recorded unless enquiry was held. Looked at from any angle, this cannot be said to be a case of abandonment of service.

33. When can a non permanent employee shall be deemed to have abandoned his service is something which has to be decided by taking into account facts of each case. Different types of leave are contemplated and the Rules also take care of medical leave. In my view, the Presiding Officer

was in error in holding that the petitioner has abandoned the services.

34. There is one more reason as to why the finding of the Presiding Officer cannot be sustained. The Presiding Officer has in para 10 of the impugned order referred to the applications made by the petitioners from time to time as also reports of Medical Officer and Medical Board. Once the management directs that the petitioner be examined by competent medical board and awaits report in that behalf, it cannot be said, in these facts and circumstances, that the petitioner has not applied for leave at all or abandoned the service. On the other hand, the ailment of the petitioner is not disputed. That she was ailing from T.B. and was under treatment is not disputed. The report of hospital where she was taking treatment in the first instance was also forwarded to the management. Further, when the management desires a second opinion about the ailment of the petitioner and whether she is fit to resume duties or not, then, in my view, it cannot turn around and allege abandonment of service by the employee. In any event, the Presiding Officer has ignored the submissions in the written statement filed by

respondents 1 and 2.

35. The management has given up this aspect when it alleges that the petitioner has not submitted leave application on medical ground from 7th August 1999 to 18th December 1999. In this behalf, it is clear that the Superintendent, Medical Board in his report dated 10th December 1999 along with fitness certificate had recommended extension of leave for recovery w.e.f. 7th August 1999. Despite this, the management says that the petitioner has not submitted leave application on medical ground. Now, when the petitioner was admittedly being examined by the medical board at the instance of management, would go to show that the management was aware of her absence. Admittedly, the management has not issued any communication to the petitioner to either expedite the submission of report from the medical board or to resume duties or to take such steps failing which it will be presumed that she is not interested in service. When the management decides to wait for the report of medical board at J.J.Hospital, then it cannot allege abandonment of service straight way. In any event, when the petitioner was examined by the medical board, she approached the

management on 14th June 1999 and requested that she be permitted to join duties and this is not denied or disputed at all. A perusal of the report of medical board of J.J.Hospital makes it abundantly clear that it was of the opinion that petitioner requires leave from 7th June 1999 to 6th August 1999 and it was also found necessary to appear before the medical board after expiry of leave. This report is dated 9th July 1999. The period specified therein came to an end on 6th August 1999. The petitioner was declared fit by the medical board of J.J.Hospital on 10th December 1999. She approached the management on being declared fit with the report in that behalf but it is her case that the management refused to accept the report and even did not permit her to resume the duties.

36. It is in the light of the aforesaid that the management contended before the Presiding Officer that the petitioner did not produce any evidence to show that she went to respondent no.2 school for resumption of duties after 18th December 1999. As observed above, the Presiding Officer does not say that there is absolutely no evidence on record. Although, he observes that there is no documentary evidence earlier, in the later

part of his order he says that there is no substantial evidence. Thereafter, the Presiding Officer contradicts himself and says that the petitioner approached on 21st January 2000. He also refers to a letter addressed by the petitioner to respondent no.2 and which is duly received. Then he refers to subsequent letters forwarded by UPC.. If this is true, then this is not a case of abandonment of service at all. Even after being declared fit, the petitioner persisted in her attempts to resume the duties but was not allowed to do so is the contention raised and it is not wholly disbelieved.

37. In my view, the learned Presiding Officer was in error in recording a finding of abandonment of services in the abovementioned facts and circumstances. His conclusion being contrary to materials placed on record can be safely termed as perverse. He has ignored the documentary evidence including report of medical board called for by the management and subsequent letters of the petitioner. Once a finding is rendered in ignorance of materials placed on record, then it is unsustainable. This is a fit case where this Court should exercise it’s writ jurisdiction and set aside the impugned order.

This Court has not upheld such actions of management and a decision to this effect is reported in 2000(4)-Mh.L.J.-507 (Dr.S.R.Ambedkar Samiti and another Vs. Ku.M.L.Lonkar and others).

38. In the light of the facts and circumstances brought on record, in my view, the Presiding Officer of School Tribunal was in patent error in rejecting petitioner’s appeal.

39. As a result, petition succeeds. Rule is made absolute in terms of prayer clause (a). Respondents are directed to reinstate the petitioner as an Assistant Teacher in respondent no.2 school with continuity of service and other benefits. As far as payment of back wages is concerned, there shall be a direction to pay full back wages. No order as to costs.

(S.C.DHARMADHIKARI, J.)